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Nos. 76-1502 and 76-1668

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWIN DAVID BANTA AND GEORGE HOHMANN, PETITIONERS

v.

UNITED STATES OF AMERICA AND FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

CITY OF ST. LOUIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19)[1] is reported at 549 F. 2d 506. The opinion of the district court (Pet. App. A-23 to A-44) is reported at 410 F. Supp. 948.

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[1]"Pet. App." designates the appendix to the petition in No. 76-1502.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1977, and a timely petition for rehearing was denied on February 25, 1977 (Pet. App. A-21). The petition for a writ of certiorari in No. 76-1502 was filed on April 28, 1977, and the petition in No. 76-1668 was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a promotional examination for the position of fire captain in the St. Louis Fire Department, which excluded a disproportionately large number of black applicants but did not measure the paramount skill required for the job, violated Title VII of the Civil Rights Act of 1964.

2. Whether Title VII of the Civil Rights Act of 1964 may constitutionally be applied to state and local governments.

STATEMENT

The United States filed this case on March 18, 1974, pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 261-262, as amended, 42 U.S.C. (and Supp. V) 2000e-5 and 2000e-6, alleging that the City of St. Louis had been and was engaged in a pattern or practice of racial discrimination in the employment practices of its Fire Department. A pending suit commenced by the Firefighters Institute for Racial Equality, Inc. ("F.I.R.E.") was consolidated with the government's suit. The Banta petitioners, representing a group of non-black employees of the Fire Department who held positions on the 1974 eligibility list for promotion to the rank of fire captain,

intervened in the consolidated actions.[2] The City of St. Louis and various officials with employment responsibilities are defendants in both actions.

1. The district court dismissed both suits (Pet. App. A-22). It held that the defendants had established that the promotional examination for the position of fire captain, which disproportionately screened out black candidates, was a reasonable measure of job performance (Pet. App. A-37, A-44).[3]

The court found that the examination for the entry level position of firefighter had a disparate racial effect and had not been validated (Pet. App. A-31). The court did not, however, hold that the use of the firefighter test violated Title VII.

The court also held that the exclusion of blacks from "supper clubs" in the firehouses was not the result of any action of the defendants and therefore did not violate Title VII (Pet. App. A-43).[4]

The United States filed a motion requesting clarification and amendment of the judgment, and on June 28, 1976, the district court entered an order finding the firefighter

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[2]The intervenors also included non-black applicants for employment who held places on the 1974 firefighter eligibility list.

[3]The position of fire captain is the first step above the entry level, and it is the first supervisory position in the Fire Department. A fire captain is responsible for supervising a group of firefighters and equipment and for training persons under his supervision (Pet. App. A-3, A-25 to A-26).

[4]Fire Department personnel, who spend a great deal of time living at the firehouse, had formed eating arrangements known as "supper clubs." Food and utensils were purchased jointly, and meals were cooked and eaten together. The City provided the cooking facilities in the firehouses (Pet. App. A-34 to A-35).

examination invalid under Title VII and granting injunctive and hiring relief (Pet. App. A-52).[5] In all other respects, the court adhered to its original judgment.

2. The court of appeals reversed in part, holding that the fire captain promotional examination was invalid and that the City's complicity in the exclusion of blacks from the "supper clubs" was illegal.[6]

The court held that the 1974 written examination for promotion to the position of fire captain had not been properly validated. The City had conducted a "content validity" study, which involved an analysis of the nature of the fire captains' jobs and an assessment of the extent to which the written test measured the ability of candidates to perform on the job. The court concluded that a "fatal flaw in the validation study" was that "[t]he captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability" (Pet. App. A-8, emphasis in original). Relying upon the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures ("EEOC Guidelines" or "Guidelines"), the court held that the test could not be sustained because it "failed to test a job component comprising over 40 percent of the employee's time" (Pet. App. A-10).

The court of appeals also held that the city had a duty under Title VII "to provide a nondiscriminatory working environment" (Pet. App. A-16), and it therefore directed

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[5]No appeal was taken from this aspect of the district court's judgment (Pet. App. A-2).

[6]The court affirmed the district court's holdings (Pet. App. A-30 to A-31, A-35 to A-36, A-44) that F.I.R.E. had not established discrimination in the procedures for appointing battalion chiefs and in not promoting George Horne. See Pet. App. A-16 to A-17.

the district court to supervise the promulgation by the City of regulations providing that the "use of city facilities by supper clubs may not continue in a discriminatory and segregated manner" (*ibid.*). Petitioners do not contest this holding.

ARGUMENT

1. Both petitions assert that the court of appeals did not properly apply the EEOC Guidelines in determining whether the fire captain test—which concededly excluded blacks in disproportionate numbers—was job-related and therefore permissible under Title VII. The Banta petitioners also argue (Banta Pet. 15-18) that this Court should reexamine the question of the degree of deference that should be given to the Guidelines. The first contention involves only the application of settled principles to the particular facts of this case; the second, although presenting a question of law, is insubstantial.

a. The City attempted to demonstrate that the fire captain promotional examination was job-related by conducting a "content validity" study, a procedure that (Pet. App. A-7) "requires that the examination reflect a representative sample of the knowledge or behavior that will be used in performance of the job." The court of appeals did not disturb the finding of the district court that the City's expert properly analyzed the tasks involved in being a fire captain. The court concluded, however, that the test had a "fatal flaw" (Pet. App. A-8) because it "admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability" (*ibid.*; emphasis in original).

While it may be true, as petitioners argue, that a test need not always assess every element of a job in order to be job-related, this principle does not assist them. Fire captains spend approximately 43 percent of their time in

supervision (Pet. App. A-8), and supervision is the only job element distinguishing a firefighter from a fire captain. A test that fails to seek out and credit supervisory skill therefore has very little value in predicting which firefighters would be good fire captains.

The court of appeals properly rejected petitioners' argument that supervisory skills could be assessed in a "six-month working test period" (Pet. App. A-10) after a candidate had been selected upon the results of the written test; the test itself screened out black firefighters without giving any assurance that those selected for the six-month trial were any more likely to be good supervisors than those who were denied the opportunity for a six-month trial.[7]

b. This Court recognized in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431, that the EEOC Guidelines are entitled to great deference, and, consequently, that courts should measure an employer's test validation study against the Guidelines. The Banta petitioners ask this Court to reassess that conclusion[8] in light of the promulgation and adoption by several federal agencies and departments, including the Department of Justice, of new Employee

[7]The City, moreover, had never used the six-month trial to demote inept supervisors (Pet. App. A-11), so that it was meaningless in practice.

[8]The St. Louis petitioners assert (Pet. 10-11) that *General Electric Co.* v. *Gilbert*, 429 U.S. 125, already has reduced the degree of deference due to the EEOC Guidelines. That decision, however, addressed a section of EEOC's sex discrimination guidelines (29 C.F.R. 1604.10 (b)) that the Court found to be in conflict with earlier pronouncements of the agency and contrary to the legislative history and plain meaning of the statute (429 U.S. at 142-145). The employee selection procedure guidelines at issue here (29 C.F.R. Part 1607) exhibit neither of those infirmities. The Court has continued to cite favorably the EEOC Guidelines at issue here. See *Dothard* v. *Rawlinson*, No. 76-422, decided June 27, 1977, slip op. 10 n. 15.

Selection Guidelines that differ in some respects from the EEOC Guidelines (Banta Pet. 17-18).[9]

Petitioners have not shown, however, that any of the differences in the guidelines would affect the outcome of this case. Whether the evidence of validation in the record is measured against the provisions of the EEOC Guidelines or the provisions of the federal executive agencies' guidelines, the promotional examination at issue is not job-related.[10] The differences between the two sets of

[9]The Equal Employment Opportunity Coordinating Council, which is composed of representatives from the Equal Employment Opportunity Commission, the Civil Rights Commission, the Civil Service Commission, and the Departments of Labor and Justice, has responsibility for developing policies to maximize effort, promote efficiency and eliminate inconsistency among the operations of the agencies and departments responsible for enforcement of federal equal employment opportunity law (Section 715, 42 U.S.C. (Supp. V) 2000e-14). In 1973 the Council began to draw up uniform guidelines on employee selection procedures. Since the EEOC determined that the resulting draft did not represent its views in some respects, the guidelines drafted by the Council were adopted only by the remaining Council members (41 Fed. Reg. 51734). The Department of Justice will, in the future, follow the joint guidelines in exercising its responsibilities under federal law, including Title VII; the EEOC will adhere to its own guidelines.

[10]Although the language of the federal executive agencies' guidelines concerning the requirements for demonstrating content validity is somewhat different from that of the EEOC Guidelines provisions, both sets of guidelines incorporate the "generally accepted professional standards" of the American Psychological Association (29 C.F.R. 1607.5(a), 41 Fed. Reg. 51985; 41 Fed. Reg. 51737). These standards, upon which the court of appeals relied heavily, provide (Pet. App. A-9) that: "An employer cannot justify an employment test on grounds of content validity if he cannot demonstrate that the content universe includes all, or nearly all, important parts of the job." The court of appeals correctly held that the test at issue did not meet that standard.

The Banta petitioners observe that the agencies' guidelines do not express a preference for any particular form of validation, while

guidelines are not material to this case; all federal agencies agree that the test is invalid, and at least within that area of agreement the guidelines continue to be entitled to great deference.

Petitioners contend that the EEOC Guidelines are not in accord with the intent of Congress to allow the use of employment tests (Banta Pet. 17). The statute permits an employer "to give and to act upon the results of any *professionally developed* ability test" (42 U.S.C. 2000e-2(h); emphasis added), so long as the test is not designed, intended, or used to discriminate.

This Court concluded in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433, and in *Albermarle*, *supra*, that the Guidelines implement the intent of Congress that employment tests not be given controlling force unless they are "demonstrably a reasonable measure of job performance" (*Griggs*, *supra*, 401 U.S. at 436). This conclusion is a sufficient answer to petitioners' statutory arguments.[11]

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the EEOC Guidelines prefer criterion-related validity studies (Pet. 17). But the court of appeals appropriately noted this difference and held that a properly prepared content validity study is acceptable under either set of guidelines (Pet. App. A-7). The problem in this case, as the court of appeals held, is that the fire captain test was not shown to be valid under *any* standard.

[11] *Washington* v. *Davis*, 426 U.S. 229, does not affect this rule. In *Washington* this Court acknowledged that test validation under Title VII involves a "more rigorous standard" than that applied under the Fifth and Fourteenth Amendments (426 U.S. at 247-248). When Title VII applies, however, job-relatedness continues to be required once it has been established that a test has a racially disproportionate effect. See *Dothard* v. *Rawlinson*, *supra*, slip op. 9-10. *Dothard* also disposes of the argument (Banta Pet. 11) that the requirements of Title VII apply less vigorously to public employment than to private employment (slip op. 10 n. 14). Public and private employers are treated alike under Title VII, so that *Griggs*, *Albermarle*, and the Guidelines are fully controlling here.

c. The St. Louis petitioners argue (Pet. 14-16) that the court of appeals incorrectly imposed the burden of proof upon them. Under Title VII, however, an employer bears the burden of showing that tests with a racially disproportionate effect are job-related. Cf. *Dothard* v. *Rawlinson*, No. 76-422, decided June 27, 1977, slip op. 9-10. If an employer meets its burden of proving that its tests are job-related, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albermarle Paper Co.*, *supra*, 422 U.S. at 425 (citation omitted).

This case never reached that point; the City never established that the fire captain test was job-related, and so it was unnecessary to show that other selection procedures could have been used. Nevertheless, the United States and the F.I.R.E. plaintiffs presented evidence that a technique, described by the City's expert witness (Pet. App. A-11) as "one of the most effective methods" of supervisory evaluation and utilized by him for other supervisory positions, was available. The court of appeals did not require the use of that technique, the assessment center, for testing the supervisory skills of prospective fire captains (Pet. App. A-12), but it properly concluded that the existence of an effective alternative method of selection was a persuasive reason to require petitioners to abandon the test presently used unless it was validated. In so doing the court did not apply an improper burden of persuasion.[12]

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[12] The Banta petitioners assert (Pet. 10-11) that there is a conflict among the lower federal courts concerning the allocation of the burden of persuasion in Title VII cases. We believe that this "conflict" is more semantic than real; the governing standards have been established in *Griggs*, *Albermarle*, and *Dothard*, and that ground need not be repatrolled by this Court. See also *International Brotherhood of Teamsters* v. *United States*, No. 75-636, decided May 31, 1977, slip op. 16.

2. The Banta petitioners argue (Pet. 8-11) that Title VII may not constitutionally be applied to the States and their subdivisions. The St. Louis petitioners, on the other hand, do not present this as a question for review by this Court.[13] The Banta petitioners do not include any governmental entity, and it is far from clear that they, as private parties, are entitled to raise a claim of governmental immunity of this sort (cf. *National League of Cities* v. *Usery*, 426 U.S. 833, 837 n. 7).

Moreover, the court of appeals declined to consider this attack upon Title VII because it had not been raised in the district court (Pet. App. A-5 n. 5). The Banta petitioners contend (Pet. 12-15) that this was error, both because a party may support its judgment with arguments not raised below and because an intervening change in the law (this Court's decision in *National League of Cities*) permits the raising of new arguments.

We agree with petitioners that a party may support a judgment with arguments rejected or not passed upon in a lower court. See *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479. This rule does not, however, permit the injection of new issues into a case on appeal as a matter of right. The usual rule is that a respondent or appellee "may make any argument *presented below* that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, No. 75-6568, decided June 17, 1977, slip op. 6 n. 6 (emphasis added). A court of appeals need not consider contentions not presented in the district court; it might, as a matter of discretion, consider them or remand the case to the district court to pass upon them in the first instance, but it is not obligated to do so. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

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[13]Although they allude (Pet. 16) to the Banta petitioners' arguments, the St. Louis petitioners do not state the constitutionality of Title VII as a question presented (Pet. 2-3).

The question whether Title VII may constitutionally be fully applied to the States is one of considerable importance. This Court has declined on two occasions to consider it, once because it was not raised in the district court (*Dothard* v. *Rawlinson*, *supra*, slip op. 1 n. 1) and once because the issue was not squarely framed by the facts (*Hazlewood School District* v. *United States*, No. 76-255, decided June 27, 1977, slip op. 6-8 n. 12). In the present case the court of appeals soundly exercised its discretion by not reaching out to consider an issue that had not been presented to the district court, and the question consequently is not before this Court.

However that may be, we submit that Title VII is a constitutional exercise of Congress' power to enact legislation to enforce the Fourteenth Amendment. The difference between Title VII and the ordinary command of the Equal Protection Clause of the Fourteenth Amendment is, as this Court held in *Washington* v. *Davis*, 426 U.S. 229, that Title VII dispenses in some cases with the requirement that the plaintiff prove a racially discriminatory motive. Title VII was designed to cope with "the consequences of employment practices, not simply the motivation" (*Griggs*, *supra*, 401 U.S. at 432; see also *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 136-137). Congress concluded that it was necessary in some cases to reduce the role played by discriminatory purpose, because proof of such a purpose is a difficult, and in some circumstances insuperable, burden to place upon the victims of subtle discrimination.

It is not unusual for Congress to abolish the requirement of discriminatory purpose and to reallocate the burden of persuasion. The Voting Rights Act of 1965, for example, was designed to afford to historic victims of discrimination the benefit of inertia and favorable burdens of persuasion; this Court upheld it as a legitimate exercise of

the power to enforce the Civil War Amendments. See *South Carolina* v. *Katzenbach*, 383 U.S. 301; cf. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75-104, decided March 1, 1977. Similarly, the Court has upheld other congressional alterations of voting laws, despite a recognized variance between the statutes and the rules that Section 1 of the Fourteenth Amendment created of its own force. See *Katzenbach* v. *Morgan*, 384 U.S. 641; *Oregon* v. *Mitchell*, 400 U.S. 112. See also *Ex parte Virginia*, 100 U.S. 339, 347-348 ("the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete"). The Court summarized some of these cases in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455: "There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative sphere of autonomy previously reserved to the States."

Title VII is an appropriate exercise of congressional power. *Fitzpatrick* relied upon Title VII as the authority for an award of back pay and attorneys' fees against a governmental body, and the Court expressed no doubt about the constitutional authority of Congress. Title VII does not involve any interference with the discretion of state and local governments to determine the number of employees they will hire, the functions they will perform, the hours they will work, or the wages they will be paid. The States' ability to determine for themselves the structure and functions of government is unimpaired. Title VII is no more than a proper legislative measure to ensure that States and their subdivisions will not discriminate—subtly or otherwise—on the basis of race or other improper criteria.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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